Justice Douglas until June 6, 1971. The petition was not filed until July 19, 1971 and is substantially out of time under Rule 22(2) of the Rules of this Court.

At trial, the defense stipulated that the evidence of petitioner's involvement in the sale of twelve pounds of hashish to two undercover agents occurred substantially as the government witnesses had testified (9 T. 1349).[1] On July 8, 1968, Smith, an informant, had telephoned an undercover agent named Swanson who was posing as an out of town buyer of narcotics. Petitioner took the phone and talked briefly with the agent. Two hours later, petitioner met the agent at Smith's apartment where, after discussing the price and quality of what he described as Lebanese hashish, he stated that he was only interested in dealing in kilo amounts. Smith took no part in the discussion then or later. The next morning petitioner telephoned agent Swanson twice to see if he was ready to purchase hashish and to arrange a meeting place. That afternoon, agent Swanson and another agent met with petitioner and his partner, Geha, in a parking lot where petitioner expounded further on the quality of the Lebanese hashish and the fact that he could deliver up to fifty kilos of hashish. After counting the $10,000 Swanson showed him, petitioner agreed to sell the agents twelve pounds of hashish. An hour later the four men met again at the same place and then drove to

[1] "T" refers to the ten volume transcript of the trial proceedings in this case which is being lodged with the Clerk of this Court.

an apartment building. While petitioner's partner and the other agent waited outside, Swanson and petitioner entered an apartment where the latter removed twelve pounds of hashish from a closet. Petitioner and his partner were then arrested and their car was searched. It contained thirty-five pounds of hashish (7 T. 884-918).

Smith, the informant, testified at this, the third, trial[2] that he told petitioner that he had a friend in San Francisco who was interested in a large narcotics deal. Petitioner told him he knew of some available hashish and that he would get back to Smith (8 T. 984). Following the first meeting with Swanson, petitioner said he thought Swanson was an agent. Smith told him he was not (8 T. 985-990). Thereafter, Smith and petitioner had no contact until after petitioner's arrest.

Petitioner testified that after his arrest he had numerous conversations with Smith in an effort to have Smith "admit what he had done to me" (9 T. 1380). An attorney prepared an affidavit based upon the facts as petitioner related them to him and petitioner's testimony at his first trial. Smith signed the affidavit after being advised he would not have to testify.[3] Later, both the attorney and petitioner

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[2] Petitioner's first conviction was remanded for reconsideration by the court of appeals in the light of *Leary* v. *United States*, 395 U.S. 6. The new trial granted by the district court ended in a mistrial after the jury failed to agree upon a verdict.

[3] Smith did not testify at the first trial. However, he was called by the defense at the second trial and by the government at the third trial.

met with Smith to go over the affidavit. Smith, in the third trial, testified that the information contained in the affidavit was false (8 T. 992-1012).[4]

The sole defense at trial was entrapment. Petitioner, who claimed he had only known Smith for a few days prior to the transaction, testified that Smith urged him to convince Geha to sell the hashish to Smith's friend. According to petitioner, Smith told him he was addicted to heroin and that he was sick and needed help. As further inducement Smith allegedly promised to give petitioner $10,000.[5] Peti-

[4] The affidavit in substance recited that Smith, a narcotics offender, had been told by agents that he would receive help if he provided the agents with arrests and convictions and that in Smith's mind petitioner would never have become involved in this transaction except for Smith's "constant inducement and persuasion." (8 T. 1006, 1009). At the second trial Smith had testified that after meeting petitioner and his partner Geha in a market he discovered that Geha had a large quantity of hashish, but he was afraid to deal with Smith and his friend. Smith then urged petitioner to convince Geha he should do business with Smith's friend, promising that, if he did, petitioner would make a lot of money. Smith asked petitioner to "just listen to a phone call * * * to a guy that * * * wanted to buy hashish * * * and see how he felt about the thing and * * * decide then * * * what he wanted to do" (5 T. 602-614). Twenty minutes later, petitioner, after overhearing Smith's telephone call to agent Swanson, introduced himself to the agent and agreed to the meeting that took place two hours later in Smith's apartment (5 T. 637).

[5] At his first trial petitioner did not make the claim that Smith said he was an addict and sick. The inducement described was simply that the petitioner, who had few funds, could make $10,000 in an hour if he convinced Geha to deal with Smith (2 T. 194-206). Petitioner did not testify at the second trial, but relied on Smith's testimony, see footnote 4, for the claim of entrapment.

tioner then went to Smith's apartment and listened when Smith called agent Swanson (9 T. 1338-1348).

1. Petitioner contends that the evidence in the third trial established entrapment as a matter of law. As the opinion below points out, there was ample evidence at trial from which the jury could find that petitioner had instigated the transaction, that he was dealing in large amounts of hashish, and that following his arrest he sought to influence the informant Smith to testify favorably for him in the second trial.

2. Petitioner also argues that his third trial placed him in double jeopardy, because at the second trial entrapment was established as a matter of law and petitioner's motion for judgment of acquittal should have been granted. After the motion was denied, the case was submitted to the jury. The jury was unable to agree on a verdict and the court declared a mistrial. While in certain cases conduct by enforcement officers as agents warrants a finding of entrapment as a matter of law, *Sorrells* v. *United States*, 287 U.S. 435, testimony at the second trial did not indicate such conduct. Although the informant Smith undoubtedly employed "artifice and strategism" to catch the petitioner, *Sorrells*, *supra*, at 441, Smith, even if his testimony, in the second trial was believed, did no more than afford the petitioner the opportunity to commit the crime charged. Thus Smith asked the petitioner to merely listen on the phone "see how he felt * * * and just decide then * * *" (5 T. 614 and 8 T. 985). Petitioner then determined he would deal with Swanson and commenced negotiations. The trial judge in denying petitioner's motion for acquittal at the

second trial correctly observed that it could not be said "that the jury could not reasonably find the defendant guilty of the charge" (6 T. 777). Since the issue of entrapment was properly submitted to the jury, there was no abuse of discretion by the trial judge in discharging the jury at the earlier trial when it failed to agree. *A fortiori*, the issue of entrapment was properly submitted to the jury in the third trial, where Smith contradicted his earlier entrapment testimony and admitted to being influenced by the petitioner with respect to that testimony.

3. Finally petitioner argues that there was no evidence to support the trial court's instruction that any attempt by petitioner to influence the testimony of a witness could be "consider[ed] * * * as evidence of guilt" (10 T. 1484-1485) and that the wording of the instruction was erroneous. Smith testified to the approaches made by petitioner and his attorney and testified that his earlier testimony and affidavit were false (Pet. 15-16). There was therefore ample basis for the instruction, which correctly required the jury to find that the earlier testimony had been false and that the attempt to influence that testimony was indicative of "consciousness of guilt" (10 T. 1484-1485).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

SEPTEMBER 1971.

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